

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

VIRGINIA MASON HOSPITAL

Employer-Petitioner

and

Case 19-UC-741

WASHINGTON STATE NURSES ASSOCIATION

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I. SUMMARY

The Employer-Petitioner (hereinafter "Employer") is a Washington State nonprofit corporation engaged in the business of providing patient and health care services at its hospital in Seattle, Washington. Union and Employer are parties to a collective-bargaining agreement that covers a unit of all full-time, part-time, and per diem nurses employed as registered nurses by Employer (hereinafter "Unit"). Employer filed the instant petition seeking to exclude the newly-created position of assistant nurse manager ("ANM") from the Unit. At issue in this case are whether the instant petition was timely filed and whether the Unit should be clarified to exclude the ANM classification. Union contends that the petition is untimely because the parties have agreed pursuant to their current collective-bargaining agreement ("contract") to include ANMs in the Unit, and even if timely, ANMs belong in the Unit because they perform work that is consistent with the Unit's description and that Unit nurses perform. Employer contends that the petition is timely because the ANM is a new classification so that unit clarification during the term of a contract is proper. It further argues that the Unit should be clarified to exclude the ANMs because they are supervisors and managers, which would render their inclusion in the Unit, inappropriate.

Based on the record evidence and the parties' contentions and arguments, I find that the instant petition is timely because unit clarification is appropriate to resolve placement of a new classification, and that the Unit should be clarified to include the ANM classification because the ANMs perform Unit duties, both in practice and as reflected by the Unit description in the parties' contract.

¹ Employer and the Union filed timely briefs, which were duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Below, I have provided a section setting forth the evidence, as revealed by the record in this case, relating to Employer's operations, the parties' contract and contractual bargaining history, and the staff nurse and ANM classifications. Following the "Evidence" section is my analysis of the applicable legal standards in this case, my conclusion, and a section ordering clarification of the Unit to include the ANM classification.

II. EVIDENCE

A. Employer's Operations and Recognition of Union

Employer is a nonprofit Washington State corporation that operates a 336-bed acute care hospital in Seattle, Washington. Its primary role is to provide health care for acute adult patients with medical and surgical needs. The Employer employs approximately 1600 employees at its hospital.

Employer is one division of Virginia Mason Medical Center ("VMMC"), the latter of which employs approximately 4500 employees. Charleen Tachibana is VMMC's senior vice president and chief nursing officer. She reports to the president, Mike Rona. Four administrative directors and four directors report directly to Tachibana. Nurse managers report directly to the directors and administrative directors. Unit nurses, and the ANMs in question, report to these nurse managers.

Union represents the Unit, which comprises approximately 575 full-time, part-time, and per diem registered nurses employed at the Employer's hospital.³ Employer and Union have been parties to a series of collective-bargaining agreements covering the Unit nurses. The parties' current contract covering Unit nurses is effective from November 16, 2004, through November 15, 2007. Article 1 (Recognition) of the parties' contract describes the Unit as follows:

1.1 Bargaining Unit. The Hospital recognizes the Association as the sole and exclusive bargaining representative for all full-time, part-time and per diem nurses employed as registered nurses by the Hospital; excluding all other supervisory and administrative/management positions and all other employees.

1.1.1 Supervisory or Managerial Classification under the NLRA. If VMH staff RNs perform supervisory and/or managerial duties, as defined by the NLRA, VMH will continue to voluntarily recognize WSNA as the bargaining representative of all staff RNs (as defined in Article 1.1 above), so long as the majority of staff RNs continue in their desire to be represented by WSNA.

1.2 New Job Classifications. During the term of this Agreement, the Hospital will endeavor to give the Association advance notice prior to implementation of any new bargaining unit job classification for which the Hospital anticipates hiring individuals licensed as registered nurses.

Record testimony reveals that the above Article 1 contractual language was last changed during the 1998 negotiations for a successor contract. Kathleen Groen,⁴ who was one of the Union's lead negotiators during those negotiations, testified about the parties' written proposals, which were

³ VMMC employs registered nurses who work outside of Employer's facility; they are not part of the Unit represented by Union.

⁴ Following her employment with the Union, Groen was employed as the Employee Relations Coordinator for Swedish Medical Center. Currently, she is employed as the Employee Relations Supervisor for Northwest Medical Hospital and Medical Center. I take administrative notice that both Hospitals are located in the Seattle area.

received into evidence.⁵ She testified that Employer presented an initial proposal that limited its recognition under Article 1.1 to inpatient registered nurses (“RNs”) in specific classifications and modified the exclusionary language to exclude “other” supervisory and administrative/management positions to reflect its contention that the RNs were supervisors and/or managers. Employer’s proposal also added, for the first time, an Article 1.1.1 that stated that Employer would continue to voluntarily recognize the Union as the inpatient staff RNs’ bargaining representative if those RNs performed supervisory or managerial duties under the Act. The Union countered with a proposal for Article 1.1 that eliminated the word “inpatient” and added the words “including but not limited to” the existing RN classifications set forth in Employer’s proposal, reflecting its contention that Employer was obligated to recognize Union as the bargaining representative for RNs whose titles might change and for new classifications of RNs. Union also countered with language for Article 1.1.1 that now appears in the current agreement. Employer’s next counterproposal included language for Article 1.1 that appears in the current agreement and accepted the Union’s language for Article 1.1.1. Groen testified that Union’s negotiators asked Employer’s chief negotiator, to whom the exclusionary language (“excluding all other supervisory and administrative/management positions”) referred, and he replied that it referred to nurses like Pat McGuire, who was then Employer’s vice president of nursing and its chief nurse executive. Groen testified that Union interpreted that to mean that Employer intended to exclude only those nursing administrators who were managing and directing the nursing operation and not providing bedside care. Employer did not present any witnesses to testify about the negotiations leading to the current language in Article 1.

B. Comparison of Staff RNs and ANMs

The staff RNs (“staff nurses”) who comprise the Unit basically provide patient care. Article 4 of the parties’ collective-bargaining agreement defines the various types of nurses employed by Employer. Article 4.2 defines the staff nurse, in relevant part, as follows: “A registered nurse who is responsible for the direct and indirect nursing care of the patients of the [Employer].” In performing those duties, a staff nurse typically assesses their patient’s needs, administers medications, assists the patient with daily living activities, speaks with others such as doctors, pharmacists, and radiologists concerning a patient’s plan of care and any care problems, and provides a report on the patient’s condition to the ANM or RN acting as the clinical advisor. A staff nurse is assigned anywhere from 3 to 6 patients, depending on the hospital nursing unit in which the staff RN works.

In addition to performing their regular nursing duties, staff nurses have frequently acted as clinical advisors⁶ in the various nursing units. When acting as a clinical advisor, the staff nurse oversees the other staff nurses during a shift to insure that they are performing their duties according to unit standards and properly assessing patients; assigns patients to staff nurses based on a determination concerning the patient’s acuity and the staff nurse’s particular skills and strengths; determines staffing for the following shift; coordinates with other nursing units with regard to accepting or transferring patients between the hospital’s nursing units; and monitors the patient/staff ratio.

Employer introduced into the record a three-page document setting forth the role expectations for a clinical advisor in VMMC’s nursing department. That document sets forth the general purpose of the role as follows:

While the Unit Clinical Advisor (CA) spends the preponderance of his/her time on a specific nursing unit, s/he is a key participant in providing safe and efficient

⁵ The parties’ proposals are set forth in Union Exhibit 13 and the expiring agreement was received into evidence as Union Exhibit 12.

⁶ The record reveals that the clinical advisor is also known as a charge nurse. Further, it is undisputed that the clinical advisor position and/or the work of that position fall within the scope of the Unit represented by the Union.

patient care throughout the entire organization. This is done by understanding the big picture and acknowledging the needs of the whole in addition to focusing on the needs of his/her home unit.

Supports the nurse manager in operationalizing [VMMC's] vision, mission, and core values. Serves in a unit leadership role to communicate organizational and unit goals, changes in policy and procedure, and progress on initiatives. Provides clinical expertise and serves as a coach and mentor for staff. Works with the manager to identify and develop unit goals, quality improvement initiatives, plans for staff recruitment and retention. The CA participates in peer review.

During the shifts when a staff nurse acts as a clinical advisor, his patient load is greatly reduced. Testimony revealed that the clinical advisor is usually not assigned patients during the day shift, though he may have 1 or 2 patients assigned during the night shift. As a result of the difference in duties when acting as a clinical advisor, the staff nurse spends a vast majority of his time at the nursing station rather than being at patients' beds administering care. The staff nurse earns a premium of \$2 per hour when acting as a clinical advisor.⁷ During the last half of 2005, 272 of the staff nurses acted as clinical advisors. Although the record is silent concerning the number of staff nurses acting as clinical advisors in 2006, testimony established that the number of hours that staff nurses perform clinical advisor duties has decreased significantly since Employer created the ANM position because the ANMs now perform the same clinical advisor duties.⁸

Employer requires that a staff nurse be licensed as a registered nurse. The vast majority of Employer's staff nurses are paid on an hourly basis. Differentiated practice ("DP") nurses, whom the parties stipulated are part of the Unit, however, are paid a salary. Article 8 of the parties' agreement specifies that as of November 16, 2005, staff nurses earned from \$22.24 to \$40.06 per hour, depending on their years of experience. Besides the premium received for acting as a clinical advisor, staff nurses earn additional pay by working certain shifts or weekends, possessing additional certifications, and working overtime. Two staff nurses who testified estimated that they earned approximately \$60,000, and between \$65,000 and \$70,000, respectively, on an annual basis. They receive the same benefits as all other employees employed by Employer.

Employer created the ANM position in January 2006⁹ in response to feedback from staff nurses that they had insufficient access to, and time to interact with, nurse managers. Besides providing more access to management, Employer created the ANM position in order to reduce "divert," which refers to the negative consequence of having to divert potential patients away from Employer's hospital because it is at full capacity. Employer posted the position in February and hired most of the ANMs in February and March. The postings described the ANM position as follows:

This position supports the department manager in providing leadership and direction to inpatient acute care departments while providing supervision and patient care. Ensures optimal flow and utilization of resources to meet demand for services with available staff. Addresses patient care or service problems as necessary. Clinically competent for patient populations served.

Employer also requires that the ANM have a RN license, a bachelor's degree in nursing, and three years of clinical experience. At the time of the hearing, Employer employed 24 ANMs, but

⁷ About 10 to 15 staff nurses, who are salaried, do not receive this premium. See next paragraph regarding DP nurses.

⁸ Testimony further established that while the number of clinical advisor hours has decreased for staff nurses, total hours for staff nurses have remained the same.

⁹ All dates hereafter occurred in 2006 unless otherwise indicated.

intends to hire additional ones. Union did not receive notice of Employer's decision to create and hire ANMs prior to the job postings, and Employer has not offered to bargain over the position.¹⁰

All ANMs are salaried. Tachibana testified that they earn an average base salary of approximately \$87,000 per year.¹¹ They are eligible for Employer's variable compensation program, which provides bonuses for attaining certain organizational and departmental goals. Only Employer's management is eligible for that program. The ANMs report to the nurse manager overseeing the unit, as do the staff nurses.

The ANMs spend much of their time interacting with the staff nurses performing patient care. ANMs usually are not assigned patients. Consistent with their job description, however, ANMs do provide direct and indirect patient care. Testimony established that ANMs will provide direct care such as administering medication to a patient, turning and cleaning up a patient, changing a patient's dressing, assisting other nurses with emergency situations. Like the staff nurses, the ANMs also provide indirect care such as consulting with social workers, doctors, and the pharmacy concerning issues such as the patient's care and whether the patient should be discharged or transferred to another of the Employer's nursing units. The amount of time that the ANMs perform patient care appears to vary depending on the nursing unit to which they are assigned in the hospital. ANM Gee testified that she occasionally provides patient care, while ANM Beaulaurier testified that she had a full patient load 1 day out of her 4 days of work each week.

Testimony established that the ANMs perform the same clinical advisor duties that staff nurses perform when the latter act as clinical advisors. The ANMs do not typically perform clinical advisor duties on the same shift as the staff nurse assigned to the clinical advisor role, though there is evidence of an ANM occasionally working the same shift as a staff nurse assigned to a clinical advisor role. ANMs are responsible for two floors, whereas a staff nurse acting as clinical advisor is responsible for one floor. Testimony varied concerning the total amount of their time that ANMs spend performing clinical advisor duties. Two staff nurse witnesses called by the Union testified that ANMs spend up to 90% of their time performing clinical advisor duties on the floor while ANM Beaulaurier testified that she performs clinical advisor duties 2 out of her 4 working days.

Unlike staff nurses, ANMs have their own office and have an office day once per week. Besides their clinical advisor duties, the record reveals that ANMs have on occasion hired, suspended, disciplined, and terminated employees, as well as scheduled them and approved their overtime. Staff nurses do not perform those duties. The ANMs have also performed annual performance evaluations, but the record does not reveal whether those evaluations are directly linked to wage increases or promotions. The ANMs hold meetings with staff nurses concerning patient care and staffing, attend management meetings, and have received training on managerial skills since July 17. The ANMs are also in charge of their respective nursing unit when the nurse manager is absent.

The record also reveals that various ANMs have undertaken initiatives to assist Employer in the performance of better and more efficient nursing care. These initiatives have included creating and publishing a nursing unit newsletter; soliciting suggestions and implementing policies to make a unit more efficient; creating programs to improve communications; and participating on committees that develop and implement policies affecting patient care.

¹⁰ I take administrative notice that the Union has filed an 8a(5) charge in Case 19-CA-30439 against the Employer in connection with its creation of the ANM position and its alleged failure/refusal to provide notice and/or an opportunity to bargain over the creation of and assignment/transfer of work to that position.

¹¹ However, a May 3 e-mail from Michelle Chacon, identified as a VMMC recruiter, states that the salary for the ANM position starts at \$61,984 per year with a mid range of \$78,000.

III. LEGAL ANALYSIS

A. Timeliness of Petition

The Union argues that the instant petition is untimely. It asserts that clarification of the Unit during the term of the parties' current contract is improper because the language of that contract unambiguously includes the disputed classification in the Unit. Contrary to the Union, I find that the instant petition is timely.

The Board's general policy is to dismiss a unit clarification petition filed during the term of a contract where the objective is to alter the contractually agreed-upon unit. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). Unit clarification is appropriate in the middle of a contract term, however, to determine the unit placement of employees who fall under a newly-created classification. *E.I. DuPont Inc.*, 341 NLRB 607, 608 (2004). As the Board explained in *Union Electric Co.*, 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it . . . Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals . . .

Applying the above precedent, I find that the instant petition is timely. It is undisputed that the ANM classification did not exist until February 2006 and therefore, the parties have never bargained about that specific classification. Historically, the Union and Employer have neither included the classification in nor excluded it from the Unit. Rather, it is a newly created position over which the parties have a dispute concerning its placement in the Unit represented by Union. Accordingly, unit clarification is proper to resolve this representational dispute over a newly created position even though clarification is during the term of the contract. *E.I. DuPont Inc.*, 341 NLRB 607, 608 (2004); *Union Electric Co.*, 217 NLRB 666, 667 (1975):

I further find that the Union's reliance on *Edison Sault Electric Co.*, 313 NLRB 753 (1994), is misplaced. In that case the Board found that a unit clarification petition filed after the parties had reached a new contract was improper where the disputed classification had been included in the unit in previous contracts and the employer had not sought to exclude that classification during contract negotiations. In the instant matter, however, Employer is not seeking to exclude a long existing position that the parties had previously agreed to include in their contract. Rather, Employer is seeking to exclude a newly created classification from the Unit that Union represents. In light of the above and the record as a whole, Employer's petition is timely and, therefore, the appropriate process for disposing of the issue surrounding the unit placement of the ANM classification.

B. Placement of the ANM Classification

Employer argues that I must exclude the ANMs from the Unit because they are supervisors and managers and their inclusion with the staff RNs would render the Unit inappropriate. Union contends that I should clarify the Unit to include the ANM classification because the contract's Unit description encompasses the ANMs because they are staff RNs who also perform supervisory and/or managerial duties. In agreement with the Union, I find that the Unit should be clarified to include the ANMs because they perform work that the Unit nurses perform and that the parties have agreed is covered by the Unit description.

The record supports the conclusion that the ANMs perform the same patient care and clinical advisor work that Unit nurses perform. Thus, the ANM job description states that "patient care" is

one of the ANM's major job functions, in addition to supervision and support for the department manager. While the ANMs generally are not assigned patients, the job description of the staff nurse set forth in Article 4.2 of the parties' agreement does not mention patient assignment. Rather, the staff nurse's job function is to provide the "direct and indirect care of the nursing patients." Here, the record reveals that like the staff nurses, the ANMs provide direct and indirect care of patients, though the amount of time spent varies by nursing unit. The ANMs also spend a significant portion of their time performing the same clinical advisor duties that staff nurses have performed. Indeed, ANM Beaulaurier testified that she spends 2 of her 4 working days on the floor performing clinical advisor duties. The performance of such duties by the ANMs has led to a significant decrease in the amount of time that staff nurses now spend performing clinical advisor duties and a resultant decrease in premium pay for Unit employees. In addition to performing the same work, ANMs and staff nurses also share common supervision and spend a significant portion of their time interacting with each other.

Although ANMs also perform additional duties, which the staff nurses do not perform and which Employer contends make them supervisors and/or managers, that fact does not alter my conclusion.¹² Even assuming that ANMs perform supervisory and/or managerial duties, the parties have agreed to include staff nurses who perform such supervisory and/or managerial duties in the Unit. Thus, Article 1.1.1 of the parties' agreement states that if staff RNs "perform supervisory and/or managerial duties, as defined by the NLRA, [Employer] will continue to voluntarily recognize [Union] as the bargaining representative of all staff RNs (as defined in Article 1.1 above)" As all of the ANMs are RNs, I disagree with Employer's contention that I must exclude them from the Unit if they are found to perform supervisory and/or managerial duties because the parties have provided otherwise in their collective-bargaining agreement.

The parties' bargaining history underlying Article 1.1 and 1.1.1 bolsters my conclusion that the ANMs should be included in the Unit even assuming that they are performing supervisory and/or managerial duties. As former Union negotiator Groen testified, Employer sought to include the language in Article 1.1.1 because it took the position that its RNs were supervisors and/or managers under the Act, but was agreeable to their continued representation by the Union. Union did not agree that they were supervisors and/or managers, and was concerned about the ambiguity created by the language in Article 1.1.1 in light of the exclusionary language ("excluding all other supervisory and administrative/management positions") that Employer had proposed in Article 1.1. Union ultimately agreed to the language in Article 1.1.1 only after it received clarification from Employer concerning the exclusionary language of Article 1.1. As Groen testified, Union negotiators asked Employer's chief negotiator, to whom the exclusionary language in Article 1.1 referred, and he stated that it referred to nurses like Pat McGuire, who was then Employer's vice president of nursing and its chief nurse executive. Groen's testimony was un rebutted. Accordingly, I reject Employer's argument in its brief that the exclusionary language in Article 1.1 clearly requires exclusion of ANMs from the Unit once it is determined that they are supervisors and/or managers. Rather, I find that based on Groen's un rebutted testimony, Employer did not intend to exclude classifications like the ANMs, who perform many of the same patient care and clinical advisor duties that staff nurses perform but did intend to exclude nursing administrators like Pat McGuire, who apparently do not have direct or indirect patient care duties.

I also reject Employer's contention that ANMs must be excluded from the Unit because the Unit would no longer be appropriate if such supervisory and/or managerial employees are included. Although the Board will not compel an employer to recognize a union that represents a bargaining unit that includes supervisory and/or managerial employees, an exception exists when the parties

¹² Although Employer also argues that ANMs receive a salary unlike staff nurses, I note that some of the staff nurses also receive a salary and that the compensation difference between the ANMs and staff nurses is not so significant as to require the exclusion of the ANMs from the Unit.

have voluntarily agreed to include such employees in the unit. As the Board explained in *Gratiot Community Hospital*, 312 NLRB 1075 fn. 2(1993), enfd. in part, 51 F.3d 1255 (6th Cir. 1995):

We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors. [Citations omitted] We perceive no basis for departing from this rule here, despite the contract's recognition clause which excludes "supervisors within the meaning of the National Labor Relations Act." Although Respondent could not be compelled to recognize the Union as the representative of a unit containing supervisors, the Respondent certainly could, and did, agree to a contract that covered certain individuals found to be supervisors.

Accord *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997). Here, Employer voluntarily agreed to include in the Unit staff RNs who perform supervisory and/or managerial duties. In light of such agreement, I find that the Act does not bar the inclusion of the ANMs in the Unit.

The cases cited by Employer in its brief do not require a different conclusion. In *Peerless Publication, Inc.*, 190 NLRB 658 (1971), the union, which represented a unit composed of employees in the employer's advertising and editorial departments, contended (with an arbitrator's approval) that two individuals were advertising department employees and therefore belonged in the unit. Finding the two individuals to be independent contractors and not employees covered by the Act, the Board clarified the unit to exclude the two individuals. Unlike the present case, however, the recognition clause describing the unit at issue in that case did not include individuals who are not employees under the Act. As there was no agreement by the employer to include such individuals, the Act required their exclusion. The same is true with respect to *Western Colorado Power Co.*, 190 NLRB 564 (1971). There, the Board granted the employers' petitions to exclude various classifications from the production and maintenance units represented by the union because those classifications were found to be supervisors. Unlike here, however, the recognition clause describing the units at issue in that case did not include employees performing supervisory duties. That distinction is critical. As noted above, my conclusion that the ANMs belong in the Unit is predicated on Employer's *agreement* in Article 1.1.1 to include in the Unit staff RNs who perform supervisory and/or managerial duties.¹³

Accordingly, based on the record evidence and the analysis set forth above, I find that the Unit should be clarified to include the ANMs.

IV. CONCLUSION

I find that the instant unit clarification petition was timely filed, and that the Unit represented by the Union should be clarified to include the Assistant Nurse Manager position.

V. ORDER

The Assistant Nurse Manager position is included in the Unit represented by the Union.

¹³ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), which Employer also cites, simply stands for the proposition that managerial employees are excluded from the protections of the Act and like supervisory employees, are excluded from bargaining units composed of rank and file employees. That is not the issue presented here. As noted above, where an employer (like Employer here) has specifically agreed to include supervisory and/or managerial employees in a bargaining unit, the Board will give effect to that agreement and find that those employees are included in the unit and covered by the Act for the duration of the agreement. *Gratiot Community Hospital*, *supra*; *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980).

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington **by 5 p.m. EDT on September 22, 2006**. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

DATED at Seattle, Washington, this 8th day of September 2006.

/s/ Richard L. Ahearn.
Richard L. Ahearn, Regional Director
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